Filed 1/28/13 In re S.W. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re S.W. et al., Persons Coming Under the Juvenile Court Law.	B242309 (Los Angeles County Super. Ct. No. CK84303)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MICHAEL W., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Reversed and remanded.

Eva E. Chick, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Michael W. (Father) appeals from an order of the juvenile court terminating his parental rights to his daughters, S.W. and A.W. He contends that the Los Angeles County Department of Children and Family Services (DCFS) failed to comply with the inquiry and notice requirements of the federal Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.), and the analogous California statutes governing custody proceedings involving Indian children. (Welf. & Inst. Code, § 224 et seq.)[1] We conclude that the inquiry conducted was not in full compliance with the requisites of the statute. We reverse for the limited purpose of full compliance with ICWA, as explained below.

FACTUAL AND PROCEDURAL BACKGROUND

The Orange County Social Services Agency (OCSSA) filed a section 300 petition on behalf of S.W. (born in June 2008) and A.W. (born February 2010) in July 2010, alleging that their parents had unresolved substance abuse problems that interfered with their ability to care for the children, and that Father had mental health problems.[2] Both parents had been arrested for being under the influence of a controlled substance and were incarcerated. The children were placed with the maternal grandmother.

The social worker inquired about the parents' possible American Indian heritage. Mother denied any such heritage, while Father stated there might be some Indian ancestry in his family but he was not sure. At the detention hearing on July 9, 2010, the Orange County Juvenile Court found a prima facie case for detaining the children and ordered OCSSA to investigate the family's possible Indian ancestry.

A social worker interviewed the parents and the maternal grandfather. The maternal grandfather said his family belonged to a tribe in either Texas or New Mexico,

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1 All undesignated section references are to the Welfare and Institutions Code.

2 Mother is not a party to this appeal.

but he did not know which one. He gave the social worker the names of his grandparents. On July 22, 2010, OCSSA sent ICWA notices to the Bureau of Indian Affairs (BIA), the Secretary of Interior, and all of the federally registered tribes in Texas and New Mexico.[3] On August 11, 2010, OCSSA provided the court with certified mail receipts for the notices that had been sent to the tribes. OCSSA also provided the court with letters received from the tribes stating the children were not enrolled members nor eligible for enrollment in their respective tribes.

The ICWA social worker spoke to the paternal great aunt, Catherine S., who stated the family tribal affiliation was with the Powhatan tribe. OCSSA noted that Powhatan is not a federally recognized tribe.

At the hearing on August 11, 2010, the Orange County Juvenile Court found that notice had been given to the BIA and the relevant tribes in accordance with ICWA requirements. Father indicated for the first time that he believed his tribal affiliation was through either the Blackfeet or Sioux tribe. The court therefore ordered notice to be sent to those tribes.

Further interviews with Father and his relatives indicated that his relatives were certain their affiliation was with the Powhatan tribe, while Father said he had "heard somewhere maybe that it was Blackfeet or Sioux." The paternal great-grandmother said she was unaware of any ancestry through the Blackfeet or Sioux tribes.

On August 20, 2010, OCSSA sent notices to the BIA, the Secretary of Interior, numerous Sioux tribes, and the Blackfeet Tribe.[4] OCSSA provided the court with certified mail receipts for those notices.

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[3] These included Pueblo of Acoma, Pueblo of Chochiti, Pueblo of Isleta, Pueblo of Jemez, Pueblo of Laguna, Pueblo of Nambe, Pueblo of Picuris, Pueblo of Pojoaque, Pueblo of San Felipe, Pueblo of San Ildefonso, Pueblo of San Juan, Pueblo of Sandia, Pueblo of Santa Ana, Pueblo of Santa Clara, Pueblo of Santo Domingo, Pueblo of Taos, Pueblo of Tesuque, Pueblo of Zia, Pueblo of Zuni, Ysleta Del Sur Pueblo, Alabama-Coushatta Tribes of Texas, Jicarilla Apache Nation, and the Mescalero Apache Tribe.

[4] The Sioux tribes included the Assiniboine and Sioux Tribes of Fort Peck, Cheyenne River Sioux, Crow Creek Sioux, Flandreau Santee Sioux, Lower Brule Sioux,

At a hearing on September 1, 2010, the court found OCSSA had complied with ICWA notice requirements. The court continued the matter to allow for receipt of responses from the Indian tribes. However, on September 7, 2010, the court transferred the case to Los Angeles County, where Mother resided.

The Los Angeles County Juvenile Court accepted jurisdiction over the matter on October 6, 2010, and scheduled a contested disposition hearing. In a report dated December 28, 2010, DCFS provided a summary of the notices OCSSA had given to the BIA and various tribes under ICWA. It also provided the letters from the Apache and Pueblo tribes stating the children were not members or eligible for membership. At the December 28, 2010 hearing, the court noted that the Orange County Juvenile Court had instructed OCSSA on August 11, 2010, to initiate ICWA notices to the Blackfeet and Sioux tribes. On September 1, 2010, that court found that notice was proper and complete as to all of the tribes.

At a subsequent hearing on February 18, 2011, the court noted that ICWA was not applicable to the case. The court declared the children dependents of the court and ordered DCFS to provide family reunification services.

The parents did little to comply with the case plan; they visited sporadically with the children and failed to appear for drug tests. In August 2011, DCFS recommended termination of family reunification services. DCFS informed the court that the maternal grandmother wanted the children's maternal aunt, who lived in Texas, to adopt the children. The maternal grandmother planned to live with the aunt and the children. DCFS requested that the court order an Interstate Compact for the Placement of Children (ICPC) so that the maternal aunt's home could be evaluated. The court so ordered. In September 2011, the juvenile court terminated family reunification services.

Lower Sioux of MN, Oglala Sioux, Prairie Island Sioux, Rosebud Sioux, Santee Sioux, Shakopee Mdewakanton Sioux, Sisseton-Wahpeton Sioux, Spirit Lake Sioux, Standing Rock Sioux, Upper Sioux of MN, and Yankton Sioux.

In the January 2012 section 366.26 hearing report, DCFS said the parents had not complied with court-ordered services. Father did not visit the children and Mother rarely did. DCFS recommended termination of parental rights.

The maternal aunt's ICPC was approved in April 2012 and DCFS recommended placement with her. The maternal grandmother continued to plan to move there along with the children. At a hearing on April 6, 2012, the court ordered the children to be placed with the maternal aunt. It ordered DCFS to initiate an adoptive home study of the maternal aunt's home.

On June 12, 2012, neither parent appeared for the section 366.26 hearing. In accordance with DCFS's recommendation, the juvenile court terminated parental rights and ordered adoption as the permanent plan for the children.

This appeal by Father followed.

DISCUSSION

Father contends on appeal that the order terminating parental rights must be reversed because DCFS did not comply with several aspects of the ICWA notice requirements. We shall discuss in turn each of Father's contentions of alleged error in ICWA notice.

Pursuant to 25 United States Code section 1912, subdivision (a): "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, [DCFS] shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." Section 224.2, subdivision (a)(1) similarly provides that notice to the tribe "shall be sent by registered or certified mail with return receipt requested." Notice given by DCFS pursuant to the ICWA must contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership. "[B]oth the federal ICWA regulations (25 C.F.R. § 23.11(d)(3) (2008)) and section 224.2, subdivision (a) require

the agency to provide all known information concerning the child's parents, grandparents and great-grandparents." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.) If known, names (maiden, married, former, and aliases), current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other information are to be provided. (*Id.* at p. 575, fn. 3.)

"Deficiencies in an ICWA notice are generally prejudicial, but may be deemed harmless under some circumstances. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162; [*In re*] *Antoinette S.* [(2002)] 104 Cal.App.4th [1401,] 1411-1413.)" (*In re Cheyanne F.*, *supra*, 164 Cal.App.4th at p. 577.) Where adequate notice has been provided pursuant to section 224.2 and neither a tribe nor the BIA has provided a response within 60 days, the court may determine that the ICWA does not apply to the proceedings. (§ 224.3, subd. (e)(3).)

We note that Father did not forfeit any deficiencies in the notice requirements by failing to raise them below because the notice provisions are designed in part to protect the potential tribe's interests. (*In re Alice M.* (2008) 161 Cal.App.4th 1189; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

A. Notice to the Blackfeet and Sioux Tribes

The children's paternal great aunt affirmatively stated that the family had Indian ancestry through the Powhatan tribe. That tribe is not federally recognized, and therefore OCSSA and DCFS were not required to notify it of the pendency of these dependency proceedings. The tribe in question must be a federally recognized Indian tribe, group, band, or community eligible for federal services provided to Indians in order to trigger ICWA notice requirements. (25 U.S.C. § 1903(8); *In re B.R.* (2009) 176 Cal.App.4th 773, 781; *In re John V.* (1992) 5 Cal.App.4th 1201, 1217.)

Father also claimed he might have Blackfeet and Sioux ancestry, although paternal relatives disagreed. Nonetheless, OCSSA sent notice to the Blackfeet and Sioux tribes, the BIA, and the Secretary of Interior. Father alleges error in that the record does not contain a certified mail receipt for the Sisseton-Walpeton Sioux tribe, and furthermore

there are no return letters in the record from any of the Blackfeet or Sioux tribes. Respondent counters that the information provided by Father was too vague to trigger the notice requirements. We do not agree. Although family members disagreed with Father's belief that the family might have Blackfeet and/or Sioux ancestry, his naming of those tribes was sufficiently specific to trigger ICWA notice requirements. Indeed, OCSSA sent notice to the Sioux tribes, a readily definable group, and to the Blackfeet tribe. Unfortunately the case was transferred to Los Angeles County on September 7, 2010, before the tribes responded (and before 60 days had elapsed),[5] and apparently there was no communication between OCSSA and DCFS thereafter to follow up on the tribes' responses. Out of an abundance of caution, we therefore remand the matter to the juvenile court to direct DCFS to send notice once again to the Blackfeet and Sioux tribes, as well as the BIA and the Secretary of Interior, and to allow the statutory time for their responses to be received.

B. Notice to the Pueblo and Apache Tribes

Father further contends that ICWA notice was inadequate because a few Apache tribes were not notified by OCSSA of the pendency of these proceedings. This argument is without merit. The maternal grandfather was specific in stating that his family was from a tribe in either Texas or New Mexico, but he did not know the name of the tribe. OCSSA noticed every federally registered tribe in those states. The three tribes Father claims should have also received notice are tribes located in Arizona (the San Carlos Apache tribe, the White Mountain Apache tribe, and the Tonto Apache tribe). The maternal grandfather did not say he had Pueblo or Apache ancestry, he only specified possible ancestry from a tribe from either New Mexico or Texas. The notices sent by OCSSA were comprehensively and specifically responsive to the information provided by the maternal grandfather. As father acknowledges, "[w]hen there is evidence that the child has a certain Indian heritage, but the identity of the specific tribe of which the child

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5 See section 224.3, subdivision (e)(3).

may be a member is unknown, the notice requirement is satisfied if notice is sent to all of the potential federally recognized tribes, as well as to the BIA." The potential tribes were those in New Mexico and Texas, according to the unambiguous information provided by a family member.

However, as with the Blackfeet and Sioux tribes, the record is devoid of responses from several of the Pueblo and Apache tribes (although many had responded that the children were not eligible for membership, and those responses are in the record). Those notices were sent in late July 2010, and therefore 60 days had not elapsed when the Orange County juvenile court transferred the case to Los Angeles on September 7, 2010. We will not simply presume that OCSSA received negative responses from the remainder of the tribes, or failed to receive responses. We therefore direct the juvenile court to order DCFS to send notice to the tribes for which a response letter is not contained in the record. By our reckoning, these include the following: Pueblo of Cochiti, Pueblo of Jemez, Pueblo of Laguna, Pueblo of Pojoaque, Pueblo of San Ildefonso, Pueblo of San Juan, Pueblo of Santa Ana, Pueblo of Taos, Pueblo of Tesuque, Pueblo of Zuni, Ysleta Del Sur Pueblo, and Alabama-Coushatta Tribes of Texas.

DISPOSITION

The order terminating parental rights is reversed. The case is remanded to the juvenile court with directions to order DCFS to provide notice to the tribes specified in this opinion, in accordance with ICWA. If after proper notice the court finds the children are Indian children, the court shall proceed in conformity with ICWA. If, after proper inquiry and notice, the court finds the children are not Indian children, the order

terminating parental rights and selecting adoption as the permanent plan shall be reinstated.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.